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No. 84-1028

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NEWS PUBLISHING CO.
d/b/a ROME NEWS TRIBUNE,
Petitioner,

vs.

BRONDON E. DEBERRY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

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REPLY BRIEF OF PETITIONER

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INTRODUCTION

The central question before this Court is whether publication of an allegedly libelous article by a newspaper is Constitutionally protected where it is based upon an investigation conducted by a responsible public official, and is supported by a sworn affidavit. Prior decisions of this Court make it manifestly clear that such a publication cannot be deemed to have been made with actual malice in the absence of "clear and convincing" evidence that the petitioner entertained serious doubts as to the truth at the time of the publication, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

ARGUMENT

THE RECORD BELOW IS VOID OF ANY EVIDENCE THAT THE DEFENDANT ENTERTAINED SERIOUS DOUBTS AS TO THE TRUTH OF THE PUBLICATION

Respondent's Brief in Opposition manifestly fails to demonstrate any evidence that the newspaper entertained serious doubts as to the truth of the article at the time of publication. Respondent argues instead that petitioner's failure to investigate further constitutes reckless disregard for the truth. This argument ignores this Court's clear pronouncement in *St. Amant* that "reckless conduct cannot be measured by whether a reasonable prudent man would have published, or would have investigated before publishing." 390 U.S. at 731.

Respondent cannot rebut the undisputed facts that the article was published as a result of charges by County Commissioner Knowles, the public official entrusted with overseeing the conduct of the correctional institution, accusing Deputy Warden DeBerry of misconduct in his official duties. Commissioner Knowles obtained the sworn affidavit of former inmate Hight and vouched for his credibility. Hight affirmed the truth of his affidavit in sworn testimony at trial below.

Commissioner Knowles initiated the article by approaching the newspaper, indicating that he had been called to the correctional institution only to be turned away by Respondent. He was later approached by Larry Hight, who indicated to Mr. Knowles that he had heard Mr. DeBerry repeat the quoted section of the article, to-wit: "Mr. DeBerry, upon seeing Mr. Knowles at the institution, stated that he, Mr. DeBerry, was going to kill Mr. Knowles or have it done." Thereafter, Mr. Knowles had Mr. Hight give an affidavit to this effect, which was sworn to and subscribed before attorney Wade C. Hoyt, III. Thereafter, this information was turned over to one of the Petitioner's reporters, Ms. Nanette Payne. Mr. Knowles gave Ms. Payne the information that he had been turned away by Mr. DeBerry when trying to get into the institution. The affidavit of Larry Hight was supplied to the petitioner with Mr. Knowles not only stating that the affidavit was true, but that another individual had told him that he had heard essentially

the same thing. Thereafter, Ms. Payne tried to repeatedly get Mr. Hight by telephone but was unsuccessful.

Based on these facts, which constitute the only information available to the defendants *at the time of publication*, the record is totally lacking in any evidence, let alone clear and convincing evidence, that the defendants entertained serious doubts as to the truth of the article at the time of publication.

Respondent's Brief in Opposition does not attempt to rebut this conclusion, or suggest additional facts *known* to the defendants at the time of publication. Respondent offers only those facts which were *not known* to the defendants at the time of publication, but were subsequently revealed at trial (i.e., that Hight allegedly removed a paint sprayer from the correctional institution, that Hight did not work in the vicinity of the rock crusher where the threatening statement was allegedly made, and that other Floyd County police officials would not believe Hight under oath).

What petitioner ignores is the critical and undisputed fact that the newspaper relied upon the assurances of Commissioner Knowles with respect to Hight's veracity. The newspaper additionally required a sworn affidavit from Hight prior to publication. The newspaper was entitled to rely upon this sworn statement, corroborated as it was by the County Commissioner.

Respondent argues that because the newspaper never interviewed Mr. Hight directly prior to publication, actual malice is thereby established. Brief in Opposition at 11-12. Relying on *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), Respondent argues that actual malice can be found where the story is based "wholly on an unverified anonymous telephone call." Brief in Opposition at 12. Respondent then asserts "reliance on Hight's affidavit, alone, under the circumstances of this case, was tantamount to relying on a wholly unverified anonymous telephone call." *Id.*

The analogy fails. Hight was clearly not anonymous, nor was his information "unverified." Hight's identity was revealed to the newspaper by Commissioner Knowles, who not only

identified him but, additionally, obtained his affidavit. The truth of the statement was also corroborated by Commissioner Knowles, who vouched for Hight's veracity and stated that he had investigated the story further, and believed it to be true. Far from relying upon an anonymous tip, the newspaper justifiably relied upon a sworn affidavit, and the investigation conducted by the County Commissioner.

Respondent's reliance upon *St. Amant, Supra,* is clearly misplaced. The facts of that case strongly support the petitioner. In *St. Amant,* this Court overturned a finding of reckless disregard by the Louisiana courts based upon the following findings of fact:

> St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.
>
> These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson.

St. Amant v. Thompson, 390 U.S. at 730.

The allegations against the defendant in *St. Amant* are virtually identical to the Respondent's version of the facts as set forth in the Brief in Opposition. Under both factual scenarios the publisher: (a) "had no personal knowledge of the [source's] activities;" (b) "relied solely upon [source's] affidavit;" (c) "failed to verify the information with those . . . who might have known the facts." *Id.*

St. Amant did not publish with actual malice, and neither did the *Rome News Tribune.* The latter *additionally* relied upon the investigation of a Floyd County Commissioner, and his

assurance of the source's veracity, while Phil St. Amant had no such corroboration when he mounted the rostrum to read from his source's affidavit.

None of the other authorities cited in the Brief in Opposition lend support to Respondent's argument that the facts of this case demonstrate clear and convincing proof of actual malice. Respondent attempts to cite Justice Harlan's minority opinion from *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-158 (1967) to support his position. Brief in Opposition at 8. The objective standard set forth in that opinion has never been adopted by this Court. *Fitzgerald v. Penthouse International, Ltd.*, 691 Fed. 2d 666 (4th Cir. 1982) and *Pep v. Newsweek, Inc.*, 553 F. Supp. 1000 (S.D. N.Y. 1983) are similarly inapposite. Both cases involve denial of summary judgment prior to trial, and do not involve the Constitutional duty of courts to review the evidence as a whole following trial, as required by *Bose Corp. v. Consumers Union of the United States*, ___U.S.___, 82 L.Ed 2d 863 (1984).

From the foregoing it is clear that the Petitioner acted in good faith, relying from the outset upon representations of the County Commissioner and a sworn affidavit. There is no evidence whatever that the newspaper "entertained serious doubts about the truth at the time of publication."

In an effort to point out the inadequacies of the reporting in the case, Respondent asserts that the newspaper "departed from responsible standards of investigation and printed the story on the basis of an obviously unreliable source without further investigation." Brief in Opposition at 17. Respondent then cites the testimony of its expert witness to support this contention.

This recitation of purported journalistic standards is far from dispositive on the issue of actual malice. It constitutes an opinion that the newspaper may have been negligent in not investigating further under some objective or academic standard for "investigative journalism." The inquiry for this Court, however, is whether the newspaper in fact entertained serious doubts about the truth of the publication. Again, the record is utterly devoid of such a showing.

CONCLUSION

For the reasons stated above, and for the reasons stated in the Petition for Certiorari, we respectfully urge this Court to follow the mandate set forth in *Bose* and independently review the evidence on the issue of actual malice.

Respectfully submitted,

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